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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 830

OSCAR GRUSS & SON,

Appellant,

—against—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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November 17, 1967.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant Oscar Gruss & Son (hereinafter called "Gruss") appeals from an order of a three-Judge United States District Court for the Southern District of New York entered on October 19, 1967, insofar as it dismisses the supplemental complaint of Gruss and denies the prayers thereof. The action was brought by Gruss to set aside, in part, orders of the Interstate Commerce Commission (the "Commission") authorizing the merger of The New York Central Railroad Company ("Central") into The Pennsylvania Railroad Company ("Penn") without requiring that The New York, New Haven and Hartford Railroad Company (the "New Haven") be included in the merged company ("Penn-Central") at the time of merger. Gruss submits this Jurisdictional Statement to show that

the Supreme Court of the United States has jurisdiction of this appeal, and that substantial questions are presented.

Opinions Below

The order appealed from is that of a statutory three-Judge Court (28 U. S. C. §§ 2284, 2325). The opinion of the Court is not yet reported. A printed copy thereof is attached as Appendix B to the Jurisdictional Statements in Nos. 778 and 779, which have been consolidated with the present case. A preliminary order was entered on June 21, 1967, without opinion, and is unreported. A copy is attached as Appendix A.

The orders appealed from were entered after a remand by this Court in No. 1060, October Term 1966, with an opinion dated May 9, 1967, reported in 386 U. S. 776. A prior opinion of the District Court therein considered is reported in 261 F. Supp. 386 (November 28, 1966).

The report of the Commission dated April 6, 1966, is reported in 327 I. C. C. 475. The Report of the Commission on Reconsideration dated September 16, 1966, is reported in 328 I. C. C. 304. The Supplemental Report of the Commission on Reconsideration and Further Hearing dated June 9, 1967, is reported in 330 I. C. C. 328. The orders of the Commission dated August 1, 1967, and September 12, 1967, unreported, are attached as Appendix 1 and Appendix 2, respectively, to the stay application of The Baltimore and Ohio Railroad Company, *et al.*, in No. 778.

Jurisdiction

The district court action was brought by Gruss under 28 U. S. C. §§ 1336, 1398, 2284 and 2321-2325, to enjoin, annul, or set aside orders of the Commission dated Septem-

ber 16, 1966, and June 9, 1967, insofar as they denied the relief sought by Gruss, and to require modification of the Commission order dated April 6, 1966. The New Haven First Mortgage 4% Bondholders Committee was permitted to intervene as a party plaintiff. The New Haven Trustees, Penn, and Central were permitted to intervene as parties defendant.

The final order of the district court was entered on October 19, 1967. Notice of appeal from that order to this Court was filed by Gruss in the United States District Court for the Southern District of New York on November 1, 1967.

The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U. S. C. §§ 1253 and 2101(b).

Jurisdiction is sustained by the decisions of this Court in *United States* v. *Drum,* 368 U. S. 370, 373 (1962), and *United States* v. *Georgia Public Service Commission,* 371 U. S. 285, 287 (1963).

The statutes involved in the case are:

28 U. S. C. (the "Judicial Code") §§1253, 1336, 1398, 2101(b), 2284, and 2321-2325.

§§5(1), 5(2) (a), (b), (c) and (d), and 5(9) of the Interstate Commerce Act (49 U. S. C. §§5(1), 5(2) (a), (b), (c) and (d), and 5 (9)).

§§5(b), 7(c), 8(b), and 10 of the Administrative Procedure Act (5 U. S. C. §§1004(b), 1006(c), 1007(b) and 1009).

§ 77(b), (c), (d), (e), and (f) of the Bankruptcy Act (11 U. S. C. § 205(b), (c), (d), (e), and (f)).

The texts of the provisions of the Judicial Code (except for §1398 thereof) and the Interstate Commerce Act are

printed in the Jurisdictional Statement in No. 778. The text of the provisions of 28 U. S. C. §1398 and of the Administrative Procedure Act and the Bankruptcy Act is attached as Appendix B hereto.

Questions Presented

The following questions are presented by this appeal:

1. Whether the District Court erred in authorizing the Interstate Commerce Commission to permit the consummation of the Penn-Central merger, prior to and without awaiting determination by the Commission of the proceedings for inclusion of the properties and operations of the New Haven Railroad in the merged company concurrently with consummation of the merger, and without a determination by the Commission of the ultimate fate of the New Haven.

2. Whether the District Court erred in failing to enjoin consummation of the Penn-Central merger unless and until the Commission requires the simultaneous inclusion of the operations of the New Haven on an interim basis, by lease or otherwise, until an ultimate determination of the New Haven reorganization proceedings.

3. Whether the District Court erred in not remanding the case to the Commission for further proceedings in conformity with the opinion of the Supreme Court of the United States in this matter, *Oscar Gruss & Son* v. *United States,* 376 U. S. 776.

Statement of the Case

This suit of Gruss is before the Court for the second time. It was brought on October 18, 1966, to enjoin con-

summation of the Penn-Central merger, and the Commission orders authorizing it, until provision is made for the actual inclusion of the New Haven.

The complaint was dismissed on the ground, based upon an erroneous reading of decisions of this Court, that Gruss had no standing to maintain it. *Oscar Gruss & Son* v. *United States,* 261 F. Supp. 386 (November 28, 1966).

That order was vacated by this Court, and the case remanded for further proceedings. *Oscar Gruss & Son* v. *United States,* 386 U. S. 776 (May 9, 1967).

Instead of remanding the case to the Commission for further proceedings, as requested by Gruss, the Court below ordered on June 21, 1967, that the complaint be dismissed, unless a supplemental complaint were filed on or before July 10, 1967. The supplemental complaint was accordingly filed.

Again the complaints were dismissed, by the order dated October 19, 1967. This time the Court below acknowledged the right of Gruss to be heard, but denied the prayer of Gruss for relief upon the ground that the Commission's indication of its intention of prescribing some form of financial aid that will permit the New Haven's operations to continue was enough to meet the Commission's statutory obligations.

In summary, the case of Gruss for injunctive relief and for reversal of the order below is based upon the following propositions:

1. Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), conditions the merger of two or more carriers upon a finding by the Commission that it "will be consistent with the public interest".

2. The Commission has found that the merger of Penn and Central would effectively destroy the ability of

the New Haven to survive and would not be in the public interest without complete inclusion of the New Haven.

3. There is and can be no assurance that the New Haven will ever be included in the merged Penn-Central, unless inclusion is required at the time of and as a condition precedent to consummation of the merger.

As shown below, the Commission has not yet determined the fate of the New Haven. Unless the Commission acts to require immediate inclusion of the New Haven at the time of and as a condition precedent to consummation of the Penn-Central merger, the New Haven will be forced out of business and into liquidation. The actual effect of the order below, permitting consummation of the Penn-Central merger without concurrent inclusion of the New Haven, is to sanction a transaction contrary to the public interest as found by the Commission, and in violation of Section 5(2) of the Interstate Commerce Act.

(a) The Merger Proceedings.

The merger sought to be enjoined was authorized by the Interstate Commerce Commission, purporting to act under Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), by Report and Order dated April 6, 1966, *Pennsylvania Railroad Company—Merger—New York Central Railroad Company,* 327 I.C.C. 475, as modified by further Reports and Orders dated September 16, 1966 (328 I.C.C. 304), June 9, 1967 (330 I.C.C. 328), August 1, 1967, and September 12, 1967.

The merger was authorized by the Commission's order dated April 6, 1966, subject to the condition (Condition No. 8, in Appendix A to the Report) that the merged com-

pany include the properties and operations of the New Haven.

That condition is based upon findings of the Commission, pursuant to Section 5(2) of the Interstate Commerce Act, that the merger of Penn and Central:

(a) Would effectively destroy the ability of the New Haven to survive; and

(b) Would not be in the public interest without complete inclusion of the New Haven. 327 I. C. C. 475, 522, 524.

The New Haven is the subject of reorganization proceedings under Section 77 of the Bankruptcy Act instituted in 1961 and still pending in the United States District Court for the District of Connecticut (the "Reorganization Court"), Bankruptcy Docket No. 30226, and before the Commission, Finance Docket No. 21669.

The Reorganization Court has found that the New Haven "cannot possibly survive several months of waiting after the Penn-Central merger takes effect to be incorporated into that system." [1]

The condition adopted by the Commission, however, does not require inclusion of the New Haven simultaneously with or as a condition precedent to consummation of the merger, but merely requires a commitment that the merged company will include the New Haven at some indefinite time in the future. 327 I.C.C. at 553.

It is our contention, as argued below, that the condition imposed by the Commission will not achieve the inclusion

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[1] Partial Ruling dated July 11, 1967, on a petition of the New Haven Trustees for instructions, a copy of which is annexed to Gruss' Application for Stay as Appendix A.

of the New Haven in the merged company ("Penn-Central"), but will, on the contrary, result in the liquidation of the New Haven. The actual effect of permitting consummation of the Penn-Central merger without concurrent inclusion of the New Haven is to sanction a transaction contrary to the public interest as found by the Commission, and in violation of Section 5(2) of the Interstate Commerce Act. The injunction denied by the order appealed from is necessary to prevent such statutory violation and to achieve the merger on terms which will be in accord with the statutory mandate.

The New Haven Trustees intervened early in the merger proceedings to seek inclusion of the New Haven in the merged Penn-Central simultaneously with and as a condition precedent to consummation.

After the close of the hearings, the New Haven Trustees abandoned that position on the basis of a private arrangement, disclosed months later, with Penn and Central. That arrangement was embodied in an agreement dated April 21, 1966, for the sale of the New Haven properties to Penn-Central, free of the bondholders' liens and without assent of the bondholders (the "Sale Proposal"), at a price that would wipe out most of the equities of the bondholders. The Sale Proposal includes a commitment of the New Haven Trustees to Penn and Central not to make or file with the Commission in the Penn-Central merger proceedings, or any judicial review thereof, any statement, stipulation, or other document inconsistent with the provisions and intent of the Sale Proposal. It also commits the New Haven Trustees to use their best efforts to effect consummation of the transactions contemplated thereby.[2] It has effectively

[2] These provisions of the Sale Proposal are set forth in Appendix B to Gruss' Application for Stay.

precluded the New Haven Trustees from representing the interest of the estate in having the Commission require simultaneous inclusion.

On July 11, 1966, in view of the change of position by the New Haven Trustees, Gruss petitioned for leave to intervene in the merger proceedings and for reconsideration of the inclusion condition, its modification to require inclusion of the New Haven simultaneously with and as a condition precedent to the merger, and an opportunity to be heard thereon.

Gruss, with its partners and affiliates, holds approximately 14% of the defaulted First and Refunding Mortgage 4% Bonds ("first mortgage bonds") of the New Haven. The claims of Gruss amount to approximately $10½ million principal and $2½ million interest.[3] Gruss had been and has continued to be an active participant in the New Haven reorganization proceedings.

The Commission permitted Gruss to intervene, but denied his petition for reconsideration, modification, and a hearing, by its order dated September 16, 1966.

Gruss then brought this action to enjoin, annul or set aside the second Commission order, insofar as it denied the relief sought by Gruss, to require a modification of the first Commission order, and to require the Commission to hold the requested hearings. The court below entered summary judgment dismissing the complaint, 261 F. Supp. 386 (S. D. N. Y. 1966).

Gruss appealed to this Court. Motions to affirm were filed by the defendants, by Penn and Central, and by the New Haven Trustees. This Court vacated the order below

[3] There are $76,819,900 principal amount of the first mortgage bonds outstanding, having a claim (with interest in default) of over $98 million.

and remanded the case with costs to Gruss, citing *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372, and noting that the Commission order attacked by Gruss was then subject to further consideration by the Commission, and that proceedings to achieve inclusion of the New Haven were also under way before the Commission. *Oscar Gruss & Son* v. *United States,* 386 U. S. 776, 777.

When the District Court received the mandate of this Court, plaintiff submitted a proposed order remanding the matter to the Commission for further consideration.[4] The District Court, however, entered an order submitted by the United States Attorney for the Southern District of New York providing that the action would be dismissed unless Gruss filed a supplemental complaint, which Gruss accordingly did on July 10, 1967. One of the questions presented by this appeal is whether the District Court erred in failing to remand the case to the Commission, which had to that point denied Gruss a hearing on the merits, and continues to do so by *ex parte* adverse rulings. See Point II, *infra.*

The Commission held further hearings on the Appendix G conditions for other railroads, but none prior to June 1967 on the Appendix A condition relating to the New Haven. The Commission's order dated June 9, 1967, modified the Appendix G conditions, and again ordered consummation of the merger, without hearing Gruss or considering the Gruss petitions,[5] despite this Court's May 8 opinion remanding the case on the appeal taken by Gruss.

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[4] A copy of the proposed order is annexed hereto as Appendix C.

[5] The Commission's supplemental report dated June 9, 1967, states, contrary to fact, that Gruss was among the "parties whose views were expressed." 330 I.C.C. at 330.

In the supplemental complaint, Gruss prayed that the court enjoin, annul or set aside the orders of the Commission dated September 16, 1966, and June 9, 1967, insofar as they authorized consummation of the merger without the simultaneous inclusion of the properties and operations of the New Haven, and (as in the original complaint) that the court direct the Commission to require inclusion of the New Haven properties and operations concurrently with the Penn-Central merger, and to hold further hearings, postponing consummation of the merger to permit completion of the hearings and inclusion of the New Haven.

In the order appealed from, the District Court dismissed the complaints without prejudice to Gruss' right to appeal from further Commission orders. We show below that if the merger is permitted to go forward, without concurrent inclusion, future appeals will be futile.

(b) Proceedings Pending for Interim Relief to the New Haven.

In April 1967 the New Haven Trustees filed with the Reorganization Court a petition for instructions. The answer filed by Gruss[6] requested that the New Haven Trustees be instructed to use their best efforts (a) to see that the operations of the New Haven are included with those of Penn and Central at the time of and as a condition precedent to the Penn-Central merger, and (b) to see that, upon any sale of properties of the New Haven to Penn-Central, the price and terms be as favorable as possible to the New Haven estate and its creditors. It also requested that the New Haven Trustees be directed to act on behalf of the estate, free of the conflicting obligations to Penn and Central which they had assumed.[7]

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[6] A copy of the answer is annexed hereto as Appendix D.

[7] The conflict of interest arises from the contract provisions set forth in Appendix B to Gruss' Application for Stay.

On July 11, 1967, the Reorganization Court issued a Partial Ruling on the petition for instructions,[8] finding that the New Haven "cannot possibly survive several months of waiting after the Penn-Central merger takes effect to be incorporated into that system. The court is therefore strongly of the opinion that the Interstate Commerce Commission should be asked to order inclusion as soon as the merger takes place."

The Reorganization Court noted that the undertakings of the New Haven Trustees to Penn and Central disabled the Trustees from asking the Commission to order immediate inclusion. The court did not direct them to seek immediate inclusion themselves, but said that "the Trustees should not oppose the immediate inclusion request by other parties in interest".

The Commission then recognized, for the first time, the need for modifying its prior orders in order actually to effect inclusion of the New Haven in the merged Penn-Central. By Order dated August 1 and served on August 3, 1967, the Commission directed Penn, Central, and the New Haven Trustees to file within 30 days a proposed lease, or their respective proposals for a lease, of the New Haven properties to the merged Penn-Central, described in the order as "steps for the immediate inclusion of the New Haven into Penn-Central by lease."

Penn, Central, and the New Haven Trustees failed and refused to comply with that order of the Commission. Instead of filing lease proposals, they filed proposals for loans up to $25 million by Penn-Central to the New Haven Trustees over a period of three years after the merger, against Trustees' certificates to be secured by a lien prior to the liens of the New Haven mortgage bonds.

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[8] See Appendix A to Gruss' Application for Stay.

Those filings were made on September 1, 1967. On September 12, 1967, the Commission issued another order modifying the August 1 order, and providing for hearings on "the most suitable means for continuing the New Haven operations" and "equitable terms for the means adopted." Without hearing the parties or purporting to determine those issues, the September 12 order states that "consummation of the Penn-Central merger should proceed pending such determination".

Those hearings were held, and argument was heard by the Commission, during the proceedings in the court below. The loan proposals were opposed, and immediate inclusion of the New Haven in the merged Penn-Central by lease or otherwise was supported, by Gruss, and by all other representatives of New Haven bondholders who appeared. Despite the admonition of the Reorganization Court that the New Haven Trustees "should not oppose the immediate inclusion request by other parties in interest", they instead sought Commission approval of a loan to keep the New Haven running, and the equity of bondholders dwindling, without immediate inclusion.[9]

The matter is still pending before the Commission, undecided, as this Jurisdictional Statement is written.

(c) New Haven Reorganization Proceedings.

While this matter was pending under the original complaint the Trustees filed with the Commission, in Finance Docket No. 21669, a purported Plan of Reorganization of the New Haven based on the Sale Proposal. The terms

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[9] Compliance by the New Haven Trustees with the July 11 instructions of the Reorganization Court and the August 1 order of the Commission might have conflicted with their commitment to Penn and Central not to make any statement, or file any document, inconsistent with the "provisions and intent" of the Sale Proposal.

of the proposed sale are discussed below. The purported Plan of Reorganization contained no provisions indicating what the present security holders of the New Haven would receive, and provided that the sale, free of mortgage liens, be consummated without any vote of bondholders. Gruss applied to the Commission for an order directing the New Haven Trustees to file a complete plan in conformity with the standards of Section 77(b) of the Bankruptcy Act, but the Commission took no action with respect to plaintiff's application.

Gruss and the intervening plaintiff in this matter, and the Trustee for a junior bond issue, had appealed from an order of the Reorganization Court which authorized the Trustees to file their purported plan with the Commission, and contained language which could be construed as approval thereof. Shortly after the decision of this Court (386 U.S. 776) vacating the November 23, 1966 order of the court below and remanding the case, the United States Court of Appeals for the Second Circuit modified the order of the Reorganization Court to eliminate the findings to which the appellants had objected, with an opinion suggesting that the New Haven Trustees should prepare "a more nearly conventional plan of reorganization for the New Haven." *Chase Manhattan Bank* v. *Smith*, 387 F. 2d 635 (May 29, 1967). Three months later, on September 1, 1967, the New Haven Trustees amended their plan to set forth their proposed treatment of the several classes of New Haven security holders. The Commission has scheduled hearings thereon to commence on November 29, 1967.

The New Haven Trustees propose to issue nothing but common stock and warrants of the reorganized New Haven to the first mortgage bondholders. Prior claims, mostly liabilities incurred during the Trustees' administration of the estate, would be met by issuing $65,956,000 of debt

securities as of August 31, 1967, with additional debt securities required as their loss operations continue to deplete the equity of bondholders. The consideration to be received by the New Haven under the Sale Proposal embodied in the New Haven Trustees' Plan consists principally of 950,000 shares of common stock of Penn and $32,000,000 principal amount of 5% bonds of that company, all having a present market value substantially under $90,000,000.[10] It thus appears that any remaining value to the claim of the first mortgage bondholders based on the Sale Proposal is a small fraction of their $98,000,000 claim.

In contrast to the pittance that the first mortgage bondholders would get under the New Haven Trustees' Plan, the evidence shows, we contend, that the New Haven is worth vastly in excess of the amount provided for the estate in the Sale Proposal. In particular, the New Haven has substantial interests in the Grand Central Terminal properties in New York City which would be wiped out under the Sale Proposal, and for which admittedly the New Haven would get nothing.

The New Haven Trustees, abiding by their commitments to Penn and Central, are resisting the efforts of bondholders to improve the price. They seek to justify it by attributing fantastic values, between 50% and 250% higher than present market values, to the common stock of Penn.

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[10] $8,000,000 of cash included in the price, the retained assets of the New Haven, and approximately $8,000,000 deposited with the Reorganization Court or held in escrow as a result of sales of properties subject to the first mortgage will be consumed (except for approximately $400,000 as of August 31, 1967) in adjustments and payment of current liabilities. Another $5,000,000 would come in ahead of bondholders if six-months claimants establish their claims to priority.

The Questions Presented Are Substantial

The questions presented by this appeal are substantial and require plenary consideration for their resolution.

The important questions arise because of the unseemly anxiety of the Commission and the Court below to hasten the merger even at the expense of denying a timely hearing to bondholders who had been deprived of effective representation by their proper spokesmen, the New Haven Trustees, through a disqualifying contract.

In that haste, the Commission and the court below have treated as certain to be done that which may never be done —inclusion of the New Haven in Penn-Central. One result of their orders, if not reversed herein, would be to make it highly unlikely that it will ever be done. In the meantime, the losses of the New Haven at the expense of the bondholders, continued and enhanced by the postponement of its inclusion in Penn-Central, represent an unconstitutional deprivation of the property of the bondholders, as the Reorganization Court has repeatedly recognized (Appendix C to Gruss' Application for Stay).

Summary of Argument

The New Haven is not capable of surviving a merger of Penn and Central that fails to include the New Haven at the time of merger. On July 11, 1967, the Reorganization Court found that immediate inclusion of the New Haven in the Penn-Central merger is essential, in order to prevent a shutdown of railroad operations, and that the Commission should be asked to order inclusion of the New Haven, as soon as the merger takes place.

This the Commission has been asked to do. In the proceedings pending before the Commission initiated by its orders dated August 1 and September 12, 1967, the Commission could decide, if the merger will not already

have taken place, that the New Haven must be included simultaneously with consummation of the merger. We submit that if, and only if, the decision to require inclusion of the New Haven simultaneously with and as a condition precedent to the merger is made before consummation of the merger will it be realistic to expect that the New Haven will ever be included in the merged company.

No order entered after consummation of the merger can actually achieve either inclusion of the New Haven in the merged Penn-Central, or the survival of the New Haven as an operating railroad. Prompt action by Penn and Central can actually be compelled in only one way—by requiring it as a condition precedent to a transaction that they wish to consummate promptly.

The merger itself does nothing to save the New Haven—quite the contrary. If the Commission were to approve loans by Penn-Central to the New Haven in lieu of immediate inclusion of the properties and operations of the New Haven in the merged Penn-Central, as requested by Penn, Central, and the New Haven Trustees, the order would not be capable of keeping the New Haven alive. The proposals involve borrowing up to $25 million on Trustees' certificates that would have claims prior to those of bondholders. Penn and Central propose to do nothing for the New Haven in the next several years except to loan money against a prior lien, to produce more losses, so that Penn and Central would be repaid at the expense of bondholders.[11] The borrowings could not be consummated without approval of the Reorganization Court and would necessarily be resisted there, and in the appellate courts if necessary, by bondholders threatened with obliteration of their equities.

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[11] Central has been and is worsening the cash shortage of the New Haven by withholding (on a specious claim of its right to do so) Grand Central Terminal rentals, amounting to over $1,500,000 at December 31, 1966, which the New Haven Trustees report as income but do not receive.

POINT I

The District Court erred in failing to enjoin consummation of the Penn-Central merger unless and until the Commission requires simultaneous inclusion of the operations of the New Haven on an interim basis, by lease or otherwise, pending an ultimate determination of the New Haven reorganization proceedings.

This case is governed by the Transportation Act of 1940, amending the Interstate Commerce Act, and particularly by Section 5 of the Interstate Commerce Act as so amended, 49 U. S. C. Section 5.

Under the Interstate Commerce Act, as amended by the Transportation Act of 1940, the Commission has no power to compel mergers and consolidations. *St. Joe Paper Co.* v. *Atlantic Coastline R.R.*, 347 U. S. 298, 305 (1954). The Commission does have the power to approve or disapprove such transactions as are proposed by carriers, and to impose terms and conditions to its approval thereof. Under both the majority and minority opinions of the Court in *St. Joe*, the "carrier" means the debtor or (if it is bankrupt) its trustees and creditors, not the trustees alone.

Section 5(2) (b) permits the Commission to enter an order approving and authorizing a merger, if the Commission finds that, subject to such terms and conditions as it shall find to be just and reasonable, the proposed transaction will be consistent with the public interest.

Under subdivision (c) of Section 5(2), the Commission is directed to give weight to "the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction".

Subdivision (d) gives the Commission authority to require the inclusion of another railroad in the territory in-

volved upon equitable terms, upon petition by the railroad requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

Thus, the Commission is permitted to approve a proposed merger if and only if it will be consistent with the public interest. What the Commission had authority to do in connection with the proposed merger of Penn and Central, and the New Haven's petition for inclusion in the merged Penn-Central, was limited by its findings of what the public interest requires.

The Commission, in its Report and Order dated April 6, 1966, found that:

> (a) *The merger of Penn and Central would not be in the public interest without complete inclusion of the New Haven.* (Emphasis supplied) 327 I. C. C. at 524.
>
> (b) The merger of Penn and Central would effectively destroy the ability of the New Haven to survive. 327 I. C. C. at 522.
>
> (c) Inclusion of the New Haven's freight and passenger operations in the merger will be consistent with the public interest. 327 I. C. C. at 526-7.

Under Section 5(2) of the Interstate Commerce Act, in view of finding (a) above, there is no statutory basis for consummation of the merger of Penn and Central without inclusion of the New Haven.

Yet, on the basis of the Commission's decisions to this date, no one can know whether the New Haven will ever be included in the merged Penn-Central. The only condition relating to inclusion of the New Haven that the Commission has thus far imposed contemplates waiting for inclusion until after the termination of the pending proceedings for

the reorganization of the New Haven, estimated on the record as approximately three years from now.

The failure of the Commission and the court below to distinguish between (a) actual inclusion of the New Haven and (b) a commitment, that may never be capable of performance, to include the New Haven some day has resulted in the anomaly that the New Haven is the only road directly threatened by the merger for which the Commission has not provided Appendix G diversion-of-traffic conditions of the type considered by this Court in *Baltimore & Ohio R. Co. v. United States,* 386 U.S. 372 (1967). (See 327 I.C.C. 475, at 561.)

Yet of all the railroads affected by the Penn-Central merger, in fact and on the findings of the Commission itself, the New Haven is most in need of protection. Its very life depends upon the traffic it handles between the terminals of Penn in the New York metropolitan area and the New Haven terminals in Boston. The proposed merger will join Penn with Central, the New Haven's principal competitor for such traffic between New York and Boston.[12]

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[12] The District Court used a remarkable piece of conjecture to pass by this matter involving acute problems of statutory standards and constitutional protection against confiscation. In its opinion on Gruss' first complaint, 261 F. Supp. 386, 389 (1966) the Court reasoned that the New Haven did not need protective and financial conditions against the impact of the huge merger because Penn-Central would not divert traffic to hurt its future division, "breaking the historic bonds between Pennsylvania Railroad and New Haven forged by geography and welded by millions of dollars of expenditures, only to renew them again some time hence." It repeated this view in the opinion under review (Appendix B to Jurisdictional Statement in No. 778, p. B-29). But this conjecture misses the real issue. Penn-Central would not break the present physical interconnections with the Pennsylvania Railroad by which the New Haven gets traffic, yet it would have every incentive to increase the New Haven's deficit during the period of limbo, by diverting traffic carload by carload to New York Central-Boston & Albany. It would be protected from the consequences by the adjustment provisions of the Sale Proposal and the

The Reorganization Court has found that the New Haven "cannot possibly survive several months of waiting after the Penn-Central merger takes effect to be incorporated into that system." (Appendix A to Gruss' Application for Stay.)

Instead of filing proposals for immediate inclusion of the New Haven by lease, Penn and Central and the New Haven Trustees propose to keep the New Haven running in this impossible competitive situation after the merger, with the bondholders bearing the losses, but with borrowings to cover the cash drain.

In the August 1 order, the Commission described what it was then requiring as "steps for immediate inclusion of the New Haven into Penn-Central by lease." In the joint brief of the Commission and the United States in the court below, that court was advised that the Commission's order had actually "set in motion machinery designed to produce operation of N H by the merged company at the time of consummation". However, on September 1, 1967, Penn, Central, and the New Haven Trustees threw a monkey wrench into the machinery by proposing loans instead of immediate inclusion.

It was and is the position of Gruss that only immediate inclusion by a lease or otherwise, required as a condition

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proposed loan proposals. Thus, the assumption underlying Judge Friendly's opinion is without factual basis. It is not at all "unrealistic" to suppose that Penn-Central would suspend existing traffic patterns, if it were in a position to profit by diverting the profitable traffic to itself while the New Haven bondholders bear the added losses. To match conjecture with conjecture, such diversion may be taking place today between the merger partners at the expense of the New Haven and may be one reason for the enormous deficits being incurred by the New Haven Trustees. Diversion can take place without overt understanding, simply by Penn reducing its aggressiveness in soliciting shippers' business. Since the exchange ratio between Penn and Central on the merger is fixed, it makes no difference to them which merger partner carries traffic and shows profits before the merger is consummated, so long as the aggregate profit is maximized at the expense of the New Haven.

precedent to the merger, would preserve the operations of the New Haven. Commission approval of the loan proposals would not be enough to authorize the borrowing against proposed Trustees' certificates, and would actually result in a liquidation of the New Haven instead of its inclusion in the merger.

The matter is still pending before the Commission as this Jurisdictional Statement is written.

The decision can determine the fate of the New Haven if and only if it requires Penn-Central to take over the New Haven operations as a condition precedent to consummation of the merger. Commission approval of a loan arrangement might appear to determine the matter, but cannot do so in fact. The Commission has no power to compel a bankrupt railroad to borrow money, or to issue Trustees' certificates having a lien prior to that of the mortgage bonds.

Any such borrowing would be governed by Section 77 of the Bankruptcy Act, 49 U. S. C. 205, and would have to be approved by the Reorganization Court. Any such proposed borrowing will be resisted by bondholders.

The New Haven Trustees have attempted to portray the problem as merely one of cash stringency which the New Haven Trustees did manage to avoid until this year, and which could be cured by a loan. The argument is fallacious. The New Haven Trustees have managed cash by borrowing, by defaulting on fixed charges, and by deferring taxes, car rentals, and other administration claims. They have proposed to fund their already accumulated debts by issuing debt securities ahead of the first mortgage bondholders (*supra* pp. 14-15). These prior claims have eaten away most of the first mortgage bondholders' property during the New

Haven Trustees' management. Continuation of this destruction of bondholders' property by more borrowing to finance more loss operations might destroy the first mortgage bondholders entirely. *Such borrowing is not immediate inclusion.* Advocacy of this additional disaster to the first mortgage bondholders by the New Haven Trustees is in violation of Judge Anderson's instructions to the Trustees not to oppose immediate inclusion (Appendix A to Gruss' Application for Stay). Gruss would be forced to resist any application of the New Haven Trustees to the Reorganization Court to issue Trustees' certificates for any such loan, and he would press for approval of the pending petition of the Committee for an immediate order for abandonment of the New Haven's operations.

The United States Court of Appeals for the Second Circuit has held that bondholders with a substantial equity, such as the first mortgage bondholders of the New Haven, are entitled to a hearing on petitions for abandonment, where operations involve losses, before debt securities may properly be extended. *Bankers Trust Company* v. *Gebhart,* 195 F.2d 238 (1952). That case would apply *a fortiori* to the proposed issue of securities having priority over the bonds, which is the basis for Penn's and Central's and the New Haven Trustees' proposals for loans now pending.

In *In re Third Ave. Transit Corp.,* 198 F. 2d 703, 707 (1952), the same Court adverted to these limitations, stating:

> "As the debtor is a public utility, the judge properly took into account the factor of the public interest in the debtor's continued operations. That, however, is but one factor; it must not be allowed to outweigh all others. There are strict limits to the extent to which, in reorganization proceedings, the interests of creditors (or of a particular class of creditors) may be

sacrificed to the public interest; to exceed those limits is (to say the least) to come dangerously close to the edge of unconstitutional taking of property, a line from which courts should keep away if possible. The reorganization judge should not compel a marked sacrifice of that kind, without first deciding, on substantial evidence, whether the interest of the creditors who would be affected by the sacrifice does not demand that prompt steps be taken to bring about abandonment of the utility's operations, including steps to procure the consent of those public authorities (if any) whose consent to abandonment is required."

This Court has affirmed the constitutional right of a railroad company to discontinue operations where continued operations cannot yield a fair return. In *Railroad Commission of Texas* v. *Eastern Texas R. Co.*, 264 U. S. 79, 85 (1924), the Court said:

"The usual permissive charter of a railroad company does not give rise to any obligation on the part of the company to operate its road at a loss. No contract that it will do so can be elicited from the acceptance of the charter or from putting the road in operation. The company, although devoting its property to the use of the public, does not do so irrevocably or absolutely, but on condition that the public shall supply sufficient traffic on a reasonable rate basis to yield a fair return. And if at any time it develops with reasonable certainty that future operation must be at a loss, the company may discontinue operation and get what it can out of the property by dismantling the road. To compel it to go on at a loss or to give up the salvage value would be to take its property without the just compensation which is a part of due process of law."

See also *Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana,* 251 U. S. 396, 399 (1920); *Bullock* v. *Railroad Commission of Florida,* 254 U. S. 513, 520-1 (1921).

The Reorganization Court has several times recognized the application of these cases to this set of facts. (See Appendix C to Gruss' Application for Stay.) "The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment." *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, 589 (1935). The public interest in continued operation of the New Haven cannot override the constitutional rights of first mortgage bondholders.

Gruss is not seeking to block the Penn-Central merger. While Gruss believes that bondholders would fare better by a liquidation of the New Haven,[13] Gruss has made clear that he would go along with inclusion of the New Haven in Penn-Central if—but only if—the New Haven's losses are stopped by immediate inclusion in Penn-Central through lease or conveyance. Gruss will then take his chances on the subsequent proceedings for determination of the fair consideration for the New Haven properties to be paid by Penn-Central, through the constitutional processes of the Commission and the courts.

Gruss's insistence on immediate inclusion is no technical detail, and no minor point. The New Haven has been running at a loss for six years under the Trustees' management, and no one has thought that its results could be changed. The situation clearly has required liquidation unless the New Haven could be absorbed by a larger road—specifically, Penn-Central. According to Penn, Central, and the New Haven Trustees, integration of the New Haven's operations

[13] Operations which public authorities desire to continue could be sold to them.

with those of Penn and Central will save approximately $5 million per year. See the Commission's reference to those savings, 327 I.C.C. at 526, note 11.

The bondholders have been immolated for years on the altar of the public interest, in maintaining the New Haven to serve New England, while awaiting this merger, but while administration claims from loss operations have piled up ahead of their rights. Simultaneously with its order of April 6, 1966, approving the merger on the condition that Penn-Central take over the New Haven, 327 I.C.C. 475, the Commission denied an application to terminate the New Haven's heavily losing interstate passenger service. *New York, N. H. & H. R. Co., Discontinuance of Trains,* 327 I.C.C. 151 (April 5, 1966).[14] While the Reorganization Court has repeatedly recognized that loss operations at the expense of the First Mortgage Bondholders could not constitutionally be continued,[15] it has deferred consideration of the pending petition for liquidation of the New Haven in the hope that inclusion in Penn-Central will sometime occur.

If the losses are not stopped by immediate inclusion, they must go on for years. This Court's decision in *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372 (March 27, 1967) threw off the hoped-for time schedule, as did also the Second Circuit's clear intimation that the Trustees' fragmentary "Plan" to sell the New Haven's assets to Penn-Central could not be put over without a vote of the New Haven's creditors and with no intimation as to what the creditors would receive in exchange. *Chase Manhattan Bank* v. *Smith,* 378 F. 2d 635 (May 29, 1967). With several years' delay still in prospect, Penn and Central con-

[14] The Commission there stated that there was "totally lacking any hope or plan for survival of this carrier, except that held out by its merger with a trunkline railroad." 327 I.C.C. 151, 173.

[15] See Appendix C to Gruss' Application for Stay.

tinue to argue before the Commission that all details of the takeover must be concluded before inclusion of the New Haven in Penn-Central—i.e., final determination of the price, and voting on and confirmation of the New Haven Plan of Reorganization. In the meantime. they argue that they need not take over the New Haven by lease, conveyance, or otherwise, unnecessary losses amounting to $5 million per year should continued to be incurred, and the bondholders should continue to bear the losses in the public interest. All that they propose to do is to supply the New Haven Trustees with cash which, after it is lost in operations, must be repaid out of the present residual equity of the bondholders.

The Commission, by the procedural positions taken as detailed on pages 9-10 and 34-36, seemed determined not to grant bondholders a hearing on the issue of immediate inclusion after the Reorganization Trustees contracted away their own right to maintain that issue. But the disrupted time schedule, the New Haven's exhaustion of cash, and Judge Anderson's order of July 11, 1967, have now finally presented the issue to it (pages 12-13 and 36).

It is no answer to the problem to say, as the District Court did (Appendix B to Jurisdictional Statement in No. 778, pp. B-28-30) that Gruss can seek review of the Commission's orders on matters now pending before it. If the stay of the merger is once lifted, it will be too late.

Penn and Central have made clear that they do not want the New Haven and would be happy to see it die. If they are permitted to merge before the ultimate fate of the New Haven is determined (in violation of the holding of this Court in *Baltimore and Ohio R. Co.* v. *United States,* 386 U. S. 372 (1967)), they can litigate without end the terms of inclusion. The New Haven cannot continue to

bear its operating losses. It has been running at a loss in reorganization for six years. It will collapse and never be included unless immediate inclusion is ordered. The statutory basis for permitting the merger would have failed, and the first mortgage bondholders would have been deprived unconstitutionally of their property without just compensation, by forced operation with continued and irremediable losses.

The Commission, Penn and Central, and the New Haven Trustees are thus faced with a dilemma. The Commission did not find the merger in compliance with the standards of the Interstate Commerce Act except on the assumption that the merged road would save the New Haven for the benefit of the public. If it were certain that the New Haven will sometime be included in Penn-Central, then there would be no excuse for not requiring Penn-Central to take it over immediately upon consummation of the merger. If Penn and Central are permitted to merge with the purchase price of the New Haven unsettled, there is no reason why they should not take over the operations of the New Haven on the same basis. *If Penn-Central gets the full benefit of the inclusion of New Haven forthwith, including the potential savings, there can be no valid reason for delay.*

On the other hand, if it is possible that the New Haven may never be included, the merger entirely lacks an adequate statutory basis of finding of public interest under Section 5 of the Interstate Commerce Act. If the difficulties of determining the price to be paid for the New Haven's assets, and the question of bondholders' votes, justify Penn and Central in a present hands-off policy on the theory that inclusion may never be completed, the merger simply cannot be supported under the statutory standards.

Not the least of the Commission's and Penn's and Central's difficulties in the face of bondholder opposition is *St. Joe Paper Co.* v. *Atlantic Coast Line R. R.*, 347 U. S. 298 (1954). There a majority of four members of this Court held that the Commission could not force a railroad to merge into another without its consent, and a minority of three suggested that this could be done with the vote of the requisite percentage of security holders entitled to vote in a reorganization. Certainly the present reorganization can never command the consent of bondholders, if the Commission accepts Penn's and Central's and the New Haven Trustees' view that the bondholders must continue to have their rights destroyed by loss operations for several more years in the name of public interest.

There are in addition serious questions as to fairness and feasibility of the Plan of Reorganization. We do not, of course, expect this Court to consider these problems at this time, but we point out that they exist. It is our contention that the consideration is grossly inadequate. Moreover, on the basis of current market prices of the Penn stock, the Reorganized Company will be barely solvent from its inception, and the Trustees are therefore forced to estimate that at time of consummation the market price of Penn stock will be more than $30 per share higher than the present market, and substantially higher than any value it has attained during the past ten years or more. Still more optimistic valuations are necessary to justify the allocations of securities between classes of bondholders.

Again, the Plan is predicated on the assumption that the consideration received will be retained, pending achievement of these optimistic values, in a non-diversified investment company registered under the Investment Company Act of 1940, 15 U. S. C. §§80a et seq. To achieve registration, the Plan assumes that the Securities and Exchange

Commission will permit departures from the standards of that Act,[16] an assumption which is not self-evidently correct for a non-diversified company top-heavy with seven-year debt, with assets concentrated in a declining industry, with a relatively thin equity below the debt, and with speculative warrants diluting the common stock.

Finally, the fate of the New Haven remains undecided because the road cannot survive without immediate inclusion, and its collapse will destroy the statutory basis of public interest in the merger.

Under the Sale Proposal Penn and Central expected to bear New Haven's losses beginning about January 1, 1968, on the assumption that inclusion would be complete by that date. Our proposal is to have inclusion consummated on the date of the merger. Either conveyance or lease would put Penn-Central in possession of the railroad at that date, with power to institute operating economies and to adjust operations and routings. The fact that consolidation of operations might destroy the operating integrity of the New Haven is of no importance, for the New Haven cannot possibly survive as an operating railroad alone, and would have to be liquidated if for any reason final closing of the sale of its properties never occurs.

Under those circumstances, it will be equitable to require Penn-Central to bear any losses of New Haven from the date of the merger. We have no doubt that a lease to this effect could be speedily drafted if the parties willed it. Financial arrangements of equal magnitude have been

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[16] Among the difficulties which the Reorganized Company would encounter are the following provisions of Section 18 (15 U. S. C. 80a-18): (i) the provisions of clause (a)(1)(A) requiring 300% asset coverage for debt securities; (ii) the prohibition in clause (c) against more than one class of debt security; and (iii) the prohibition in clause (d) against issuance of warrants with a duration of more than 120 days.

undertaken under emergency pressures using letters of intent for transactions with unknowns far more difficult to define than those here involved.

Both Gruss and Manufacturers Hanover Trust Company, indenture trustee for the first mortgage bonds, have submitted to the Commission outlines of the terms of a lease. Gruss' proposal provides in substance that the rent shall be nominal, and Gruss makes clear that Penn-Central is free to put in operating economies forthwith, to abandon operations (subject, of course, to necessary public authorizations), to sell assets, etc.

If Gruss has made technical errors, counsel for the New Haven Trustees and for Penn and Central have the competence to correct them.

Since the purpose of this lease is merely to maintain the status quo pending completion of the New Haven reorganization, we are satisfied that it does not require a vote of creditors of the New Haven. Such a lease would (a) protect the public interest by keeping the New Haven running until completion of reorganization (b) without destroying the equity of the bondholders by continued losses. No program other than immediate inclusion by lease or conveyance will do so. Above all, authorization of the merger will not do so unless accompanied by a requirement of immediate inclusion as a condition precedent.

If the New Haven were ready for immediate closing of an agreement with Penn-Central, Penn-Central would have to take the New Haven's losses immediately. The fact that closing is delayed by the New Haven's reorganization proceedings, which are themselves delayed by the tactics described on pages 13-14 hereof and by the fact that Penn-Central has offered an unfair and inadequate price for the New Haven, should not change matters. This Court should

direct immediate inclusion of the New Haven in Penn-Central at the merger date, or should direct that the merger be enjoined until the Commission decides that issue in the proceedings now before it and until review of the Commission's decision.

POINT II

The District Court erred in not remanding the case to the Commission for an orderly hearing on Gruss' application for immediate inclusion of the New Haven in Penn-Central, following remand by this Court on May 9, 1967.

The law has seen no more dismal demonstration than this case of the old copybook maxim: "Haste makes waste." Every effort was made to deny bondholders a hearing on immediate inclusion, and now the hearing is still going on while this case is before this Court. By authorizing immediate consummation of the merger while the Commission is still pondering the issue of immediate inclusion, the District Court and the Commission have denied to Gruss the orderly procedure contemplated by Sections 5(b) and 8(b) of the Administrative Procedure Act, 5 U.S.C. §§1004(b), 1007(b) (Appendix B hereto).

The problem started when the New Haven Trustees intervened in the Penn-Central merger proceedings and properly requested immediate inclusion of the New Haven in the proposed merger. At this point, no New Haven bondholder had any occasion to seek to argue the point himself. But in December 1964 the New Haven Trustees reached an understanding with Penn and Central. The understanding was not reported until four months later, April 7, 1965, and was formalized a year later in the Sale Proposal dated

April 21, 1966. There were no hearings on the 1965 report, which stated that a definitive agreement would be prepared "as promptly as possible" and submitted to the Reorganization Court for appropriate action "upon its completion." No hearings on the Sale Proposal were held until October 1966.

In the Sale Proposal, the New Haven Trustees agree to limit the documents to be filed by them in the Penn-Central merger proceedings before the Commission, or in any judicial review thereof, thus abandoning their position that inclusion of the New Haven's operations should be required by the Commission as a condition precedent to consummation of the Penn-Central merger. (See Appendix A to Gruss' Application for Stay.)

In the Sale Proposal, the New Haven Trustees commit themselves to Penn and Central to use their best efforts, as Trustees, to effect consummation of the transactions contemplated thereby. (See Appendix A to Gruss' Application for Stay.)

Thus by April 27, 1966, when the April 6 Report and Order were served, the New Haven Trustees had disabled themselves from maintaining their previous position before the Commission, and in effect had left the first mortgage bondholders without representation in the Penn-Central merger proceedings. Even worse, they had committed themselves to Penn and Central to oppose any efforts of first mortgage bondholders (a) to secure protection for the New Haven from the adverse effects of the Penn-Central merger, by simultaneous inclusion or otherwise, or (b) to improve, from the standpoint of the New Haven, the terms of inclusion.

In view of the New Haven Trustees' change of position, on July 11, 1966, the Gruss petitions were filed. The peti-

tions pray for the entry of an order by the Commission reconsidering and modifying said Condition No. 8 to require inclusion of the New Haven at the time of and as a condition precedent to the merger of the Pennsylvania and the Central, holding further hearings, and postponing consummation of the merger to permit the completion of such hearings, and such inclusion of the New Haven.

The petitions took the same position that the New Haven Trustees had taken before they contracted away their right to maintain the position. The New Haven Trustees did an about face and now opposed this position, as did Penn and Central. The Commission, despite the clear situation by which the bondholders were denied representation, denied the petitions.

Gruss' original complaint in the district court met the opposition of the Commission and the United States and of Penn and Central on the ground that Gruss had no standing to sue, and that only the New Haven Trustees could act. While we submit that the Trustees' disqualification was patent, the District Court brushed aside Gruss' argument to that effect on the ground that only the Reorganization Court could so find. *Oscar Gruss & Son* v. *United States,* 261 F. Supp. 386 (1966). This Court vacated the district court order of dismissal, 386 U. S. 776 (May 9, 1967), for the reason that the merger matter, including the question of inclusion of New Haven, was again pending before the Commission following the remand in *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372 (1967).

We think it apparent that this Court expected the Gruss matter to go back to the Commission with the other questions then pending before it, including the very same questions of diversion-of-traffic and other protective conditions.

The Commission would have had a month to consider Gruss' petition before entering its order of June 9, 1967. But instead of hearing Gruss, it erroneously recited that it had done so. (See note 5 above, p. 10.) It used every effort to avoid hearing Gruss. It opposed Gruss' requested order remanding the case to it, and the District Court held the case, signing an order dismissing Gruss' case unless Gruss filed a supplemental complaint by July 10, 1967

Gruss was forced to go ahead on a supplemental complaint, without having been heard by the Commission in an orderly fashion on his petition. Again the Commission and the United States attacked Gruss' standing on the ground that only the New Haven Trustees could represent the New Haven estate. This time Penn and Central even sought to avoid the challenge to their position by arguing that only an indenture trustee could speak for bondholders, a point which the District Court properly brushed aside (Appendix B to Jurisdictional Statement in No. 778, page B-27, note 16). This time the District Court heard the matter on the merits. It could no longer ignore the fact that Gruss and other bondholders could not properly be represented by the New Haven Trustees, for the Reorganization Court had on July 11, 1967, so recognized (Appendix A to Gruss' Application for Stay).

The effect of the disorderly procedure accepted by the district court was that that court let the merger go ahead while the Commission had never decided the issue of immediate inclusion, and only the stay granted by this Court has prevented the issue from becoming moot.

The Commission in its order of September 12, 1967, after Penn, Central, and the New Haven Trustees had defied its August 1 order, authorized the merger to go ahead, at the very time that it was setting hearings on the question

whether the merger authorization be conditioned on immediate inclusion (Application for Stay in No. 778, Appendix 2). Thus the Commission prejudged a matter on which it was about to hold hearings, in violation of Gruss' right to an orderly hearing. Again, only the stay granted by this Court prevents the issue still pending before the Commission from being made moot.

The issue of immediate inclusion is still undecided by the Commission as this Jurisdictional Statement is written.

This sorry history shows, we submit, that the Court should not be stampeded by tales of the New Haven's distress (which merger without concurrent inclusion of the New Haven would not in any event cure, as argued in Point I). The merger should be enjoined until this Court decides the issue of immediate inclusion or until the Commission passes on the pending proceedings for immediate inclusion, and until appeals from any order of the Commission denying immediate inclusion have been decided.

CONCLUSION

This Court has jurisdiction. The questions presented are substantial.

The order of the District Court should be reversed and remanded with instructions to restrain consummation of the Penn-Central merger unless and until the operations of the New Haven are included on an interim basis by lease or otherwise, pending completion of the New Haven's reorganization proceedings.

Respectfully submitted,

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